Supreme Court of the United States

OCTOBER TERM, 1950

NO. 147.

THE STATE OF WEST VIRGINIA, at the Relation of DR. N. H. DYER, et al., etc., Petitioners,

v.

EDGAR B. SIMS, Auditor of the State of West Virginia.

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE.

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The Commonwealth of Pennsylvania adopts the following provisions of the brief for the petitioner:

OPINIONS BELOW, JURISDICTION, QUESTIONS PRESENTED, CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

STATEMENT OF THE CASE.

The Attorney General of Pennsylvania adopts the statement of the case in the brief for the petitioner, but submits additional facts to show that Pennsylvania has a direct and substantial interest in securing a ruling that the State of West Virginia is bound by the provisions of the Ohio River Valley Water Sanitation Compact.

The Monongahela River and its tributaries rise in West Virginia. The Monongahela is joined by the Cheat

River at a point in Pennsylvania near the boundary between West Virginia and Pennsylvania and then flows through Pennsylvania to Pittsburgh where it meets the Allegheny River to form the Ohio River.

The total length of the Monongahela River is 128.1 miles, of which 36.5 miles are in West Virginia and 91.6 miles in Pennsylvania. The total drainage area of the Monongahela River is 7340 square miles and of this area 4612 square miles are situated in West Virginia and 2728 square miles in Pennsylvania.

The Monongahela River provides water for public water supplies in Pennsylvania serving a total population of 465,090 persons.

Fifty municipalities in West Virginia, having a population of 500 or more, discharge wastes by sewers into the Monongahela River.

Sixty-five industrial establishments in West Virginia contributes wastes through sewers into the Monongahela. Of these industries, twelve are coal washeries contributing silt and six are industrial plants contributing wastes of a chemical nature.

Under appropriate legislation Pennsylvania is requiring the treatment of sewage and of industrial wastes, including silt from bituminous coal mines.

Article VI of the Compact expressly provides that all sewage from municipalities or other political subdivisions, public or private institutions or corporations, discharged or permitted to flow into portions of the Ohio River and its tributaries, including waters which flow from one signatory state into another signatory state, as well as all industrial wastes which are permitted to

flow into such waters, shall be treated before being discharged into such waters (Petition, pp. 40-41).

Failure of West Virginia to treat sewage and industrial wastes, as provided in the Compact, will very substantially lessen the effect of the program of Pennsylvania for the purification of streams.

ARGUMENT.

I.

A STATE MAY NOT, BY THE ADOPTION OF A CONSTITUTION OR BY THE DECISION OF ITS HIGHEST COURT, DISABLE ITSELF FROM EXERCISING AN INHERENT POWER OR FROM PERFORMING THE OBLIGATIONS IMPOSED BY THE FEDERAL CONSTITUTION OR LAWS UPON IT AS A MEMBER OF THE UNION.

Prior to the adoption of the Federal Constitution every state, as part of its sovereignty, had inherent power to enter into compacts with other states:

Poole v. Fleeger, 11 Peters 185, 209 (1837);
Rhode Island v. Massachusetts, 12 Peters 657, 725 (1830).

The Compact Clause of the Constitution necessarily recognized and affirmed the existence of this power in the states:

Poole v. Fleeger, 11 Peters 185, 209 (1837);
Virginia v. West Virginia, 246 U. S. 565, 601, 602 (1918).

May any agency of a state or the people thereof, by the adoption of a constitution or otherwise, deny or deprive the state of this inherent power to enter into or perform a compact with other states?

This precise question has not been decided. We suggest, however, as an analogy, the fundamental principle, that Congress may not, as a condition of admission, deprive a new state of any of the powers possessed by other states.

* * *

The decisions of this court have with finality denied the right of Congress to do this.

Thus in *Coyle v. Oklahoma,* 221 U. S. 559 (1911), the enabling act for the admission of the new State of Oklahoma required as a condition that its capital be located in a named city.

In holding this condition unconstitutional, this court, by Mr. Justice Lurton, said:

> "The power is to admit 'new States into this Union.'
>
> "'This Union' was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. * * * (567)
>
> * * * * * * *
>
> "The plain deduction from this case is that when a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty

and jurisdiction which pertain to the original States, and that such powers may not be constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which the new State came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission. 573)

* * * * * * *

"* * * *Equality of constitutional right and power is the condition of all the States of the Union, old and new.* * * *" (575) (Italics added)

"To this we may add that the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republi was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution." (580)

The opinion also quoted (p. 575) the following language of Mr. Justice Field in *Escanaba Co. v. Chicago*, 107 U. S. 678 (1882):

"* * * Equality of constitutional right and power is the condition of all the States of the Union, old and new. * * *" (689)

Furthermore, this court has held that this principle was equally applicable in spite of the fact that the people of the state by vote expressly and unequivocally gave their consent to the condition depriving the state of the power in question.

Thus in *Coyle v. Oklahoma, supra,* the Constitutional Convention to form the proposed State of Oklahoma ordained that the Convention

"do by this ordinance irrevocable, accept the terms and conditions of"

the enabling act (564).

This ordinance was submitted with the constitution as a separate matter and was ratified (565).

So the condition purporting to surrender the power to locate the capital of the state was expressly and formally accepted and agreed to by the people of the proposed State of Oklahoma.

All that written language could accomplish to give consent and bind the new state, was done by its people.

We have stressed these facts because they show that the ruling was definitely made by this court that *the people of a state* could not by any act done at the time of its admission, surrender the power that was inherent in other states, or to state the principle differently, this court necessarily decided that a state or the people thereof, may not by popular vote at the time of its admission, disable the state from exercising a power inherent in other states.

What greater right, then, would a state or its people have, after admission is an accomplished fact, to surrender a recognized power of a state by their action in the adoption of a new constitution?

States so self-disabled would form a weakened and imperfect union.

Coyle v. Oklahoma holds that the framers of the constitution did not intend that Congress should have

the power, or be permitted, to impose a disability upon a state before its admission, or as a condition precedent to its admission. With equal cogency it may be reasoned that the framers did not intend that after a state had been admitted, some authority thereof—the Legislature or the Supreme Court, or even the people of the state by constitutional amendment—should be allowed to disable the state from exercising an inherent power which all states possessed, or from performing an obligation which the state had assumed or to impose any restriction on the power of the state to do so.

A new state upon admission is as fully sovereign and has the same powers as the thirteen original states or any other state. Congress may not impose any limitation upon the sovereignty of the new state, by disability or otherwise. The same reasoning applies to any self-imposed limitation or disability. There will be an even greater temptation to the people of the state to take some short-sighted action believed to further its selfish interests, than to Congress which is made up of representatives of every state and is less inclined to favor a local interest.

A state whose constitution is weakened by restrictions or disabilities is just as unfit for membership in the Union whether the same are imposed by an Act of Congress or by a clause of the State Constitution.

The restriction held invalid in *Coyle v. Oklahoma, supra*, affected only the internal management of that state. The restriction imposed by the Constitution or a judicial decision in West Virginia would hinder, if not wholly defeat, the purpose and performance of a compact in which other states are interested.

Let us suppose that Congress—desiring to prevent compacts between states which might hamper Federal power — imposes as a condition to the admission of a particular state that such state have no power to enter into compacts with other states.

Even though the people of the new state voluntarily assent to this limitation, the condition would be invalid under the decisions of this court.

If the people of the state cannot assent to the waiver of a power to enter into compacts, in order to secure admission to the Union, they likewise could not by Constitutional Amendment excise from the sovereignty of the state the power to enter into compacts.

Every argument based upon the policy of preserving the integrity of the state — its possession of the same power as other states— applies equally whether the excise is made by Congress or by the people of the states themselves, and whether the people act before or after admission to statehood.

The reason and the result are the same whether the disability is created by Act of Congress or is self-imposed by amending the Constitution of the State.

It may be argued that the Constitution contains no provision that a state may not surrender or disable itself from exercising one of the inherent powers of states. Neither does the Constitution have any language prohibiting Congress from disabling a state from exercising a power as a condition of admission.

In *Coyle v. Oklahoma, supra,* this court reasoned that this restriction on the power of Congress was neces-

sary in order to preserve the equality of states and in order to preserve the integrity of the Union.

The opinion in this case further stated—

> "In Texas v. White, 7 Wall. 700, 725, Chief Justice Chase said in strong and memorable language that, 'the Constitution, in all of its provisions looks to an indestructible Union, composed of indestructible States.'" (579)

If Congress or a state can excise one power, it can excise many, until the states are fatally weakened and neither the Union nor the states are then indestructible.

This excision of powers will be just as destructive, whether it is done by Congress or by the people of the states themselves.

Hawke v. Smith, 253 U. S. 221 (1920).

Article V of the Federal Constitution provided that an amendment shall be part of the Constitution when ratified by the legislatures of three-fourths of the several states.

This provision conferred specifically upon the legislature of a state the power to ratify or reject an amendment to the Federal Constitution.

An amendment to the Ohio Constitution provided

> "* * * 'The people also reserve to themselves the legislative power of the referendum on the action of the general assembly ratifying any proposed amendment to the constitution of the United States.' * * *" (225)

This amendment to the Ohio Constitution attempted to take the power of ratification from the legislature and vest it in the people to be exercised by a referendum.

This court held that the people by amendment to the state constitution could not deprive its legislature of its power of ratification conferred by Article V.

Second Employers' Liability Cases, 223 U. S. 1 (1912).

In this case the Supreme Court of Errors of the State of Connecticut had refused to accept or exercise jurisdiction conferred upon the courts of the state by the federal employer's liability act to hear claims for damages under it.

This action was reversed by this court.

In the opinion, Mr. Justice Van Devanter, said:

> "The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State. * * *." (57)

So in this case, when Congress approved the compact, it adopted the standards for the prevention of pollution, as set up therein, for this interstate stream, and the policy therein expressed became the policy for all of the territory embraced within the boundaries of the signatory states.

II.

THE DECISION OF THE SUPREME COURT OF WEST VIRGINIA THAT THE COMPACT VIOLATES THE CONSTITUTION OF THAT STATE, IS NOT CONCLUSIVE UPON THIS COURT.

It was so ruled in—

Hunterlider v. La Plata Co., 304 U. S. 92 (1938).

In this case the Supreme Court of Colorado had held that a provision in a compact between that state and New Mexico, for apportionment of water of a river between the two states, was in violation of the Colorado constitution and void (p. 99).

This court reversed and enforced the compact.

This court has repeatedly held that in order to determine whether the obligation of a contract has been impaired, it will examine the record and determine for itself whether a contract was legally made and is binding upon the party. Otherwise, the constitutional guaranty could be readily evaded by a decision of a state court that no contract existed. See *Kentucky v. Indiana*, 281 U. S. 163, 166-167 (1930).

The same urgency exists in passing upon the validity of a compact. If a state could escape its obligations under a compact by a ruling of its courts that its exe-

cution was *ultra vires,* the exercise of the power of Congress under the compact clause would be nullified.

In deciding the validity of a contract between private parties, the court must pass upon the legality of the act of each party in signing the same; for example, whether a party signing was *sui juris,* or whether execution by an agent was in excess of the latter's authority.

So in order to determine the validity of this compact, it becomes necessary for this court to decide the legality of the act of West Virginia in executing such compact and to decide whether the state, in view of the provisions of its constitution lacked capacity to enter into the compact.

Approval by Congress is not merely a condition precedent to the validity of a contract among states.

The effect of the approval of a compact by Congress was determined by this court in

Virginia v. West Virginia, 246 U. S. 565 (1918).

The legislature of West Virginia failed to levy taxes to provide for the payment of its share of the debt and the state defaulted in payment. The State of Virginia filed an original suit in this court to compel performance of the compact by the State of West Virginia.

West Virginia set up in defense that it could not be controlled by judicial process or be compelled to levy a tax to create a fund to pay a judgment in favor of Virginia.

This court sustained the compact and the power of this court to enforce the same.

In the opinion, Chief Justice White said:

* * * * * * *

"The vesting in Congress of complete power to control agreements between States, that is, to authorize them when deemed advisable and to refuse to sanction them when disapproved, clearly rested upon the conception that *Congress*, as the repository not only of legislative power but of primary authority to maintain armies and declare war, speaking for all the States and for their protection, was concerned with such agreements, and therefore *was virtually endowed with the ultimate power of final agreement which was withdrawn from state authority and brought within the federal power.* It follows as a necessary implication that the power of Congress to refuse or to assent to a contract between States carried with it the right, if the contract was assented to and hence became operative by the will of Congress, *to see to its enforcement.* * * * (601)

* * * it further follows, as we have already seen, that, by the very fact that the national power is paramount in the area over which it extends, the lawful exertion of its authority by Congress to compel compliance with the obligation resulting from the contract between the two States which it approved is not circumscribed by the powers reserved to the States. Indeed, the argument that the recognition of such a power in Congress is subversive of our constitutional institutions from its mere

statement proves to the contrary, since at last it comes to insisting that any one State may, by violating its obligations under the Constitution, take away the rights of another and thus destroy constitutional government. * * *" (Italics supplied) (602).

In this opinion this court states that the constitution confers upon Congress

"ultimate power of final agreement"

in regard to compacts between states.

The opinion also declares that this power of final agreement "was withdrawn from state authority and brought within the federal power".

After "the ultimate power of final agreement" has been exercised by Congress, the compact must necessarily be final and complete. The significance of the words "final agreement", is that no state may alter or rescind the compact or withdraw therefrom. Whether the effort to withdraw is made by action of the people by constitutional amendment or by decision of the highest court of the state, is immaterial. Otherwise, the people of the state or its courts may at any time completely nullify the effect of the act of Congress in approving the compact.

The compact itself contains no clause permitting a state or states to amend the compact or to withdraw therefrom.

West Virginia, by Act of its Legislature, ratified and approved the Ohio River Valley Water Sanitation Compact on March 11, 1939 (R. 1, 2).

Congress approved the compact on July 11, 1940 (Appendix to petitioner's brief, pp. 38, 45).

The compact was subsequently ratified by the states of Pennsylvania and Virginia.

Just as in the case of contracts between private parties, a state, after it has executed a compact, is under a legal obligation to do nothing that will impair its ability or disability to cooperate with other states and to perform the obligations which it and the other states have assumed.

Congress may be interested just as much in the performance, as in the execution, of a compact between states.

In addition, other states have acquired rights and incurred obligations in reliance upon the execution of this compact by West Virginia and its approval by Congress. West Virginia cannot now rescind its act of execution or void its compact by a decision of its appellate court.

This court has held that a compact approved by Congress becomes a law of the United States. If this be true, a compact approved by Congress becomes a law which each signatory state must obey. Such a law cannot be repealed or avoided by act of the people or courts of a state.

In *Pennsylvania v. Wheeling and Belmont Bridge Company*, 54 U. S. (13 How.) 518, this court said of a compact between Kentucky and West Virginia with respect to navigation of the Ohio River:

"This Compact, by the action of Congress, has become a law of the Union." (566)

The sentence quoted was repeated by Mr. Justice Holmes in *Wedding v. Miller*, 192 U S. 573, 583 (1904); *Missouri v. Illinois*, 200 U. S. 496, 519 (1906).

III.

THE STATE OF WEST VIRGINIA DID NOT SURRENDER ITS POLICE POWER BY JOINING IN THIS INTERSTATE COMPACT.

The compact deals with the problem of pollution in an interstate stream. One state by separate action cannot effectively control or lessen pollution in such a stream. To accomplish this result will require joint action by all of the states situate in the Ohio River Basin.

In order to exercise more effectively its police power in lessening pollution in this stream, the State of West Virginia acts jointly with other states through which the stream flows.

In doing this, the state is exercising, not surrendering, its police power. It joins with other states in exercising its police power because a separate act of police legislation by its legislature would be ineffectual. The result—the lessening of pollution—can be accomplished only by the action of other states who join with West Virginia.

In order to exercise its police power a state need not act in complete isolation. It may act jointly with other states. Thus numerous agreements and compacts

have been entered into by states to establish and enforce standards for safety and efficiency of highways. These subjects are clearly police legislation.

Perhaps no powers of the federal government are less capable of delegation than its great war powers. Yet in its foreign wars the United States has entered into alliance with other nations to set up joint staffs and joint control of the war effort.

Furthermore, the compact sets up definite minimum standards for regulation of pollution (Art. VII, Page 42 of Appendix of petitioner's brief). By ratifying the compact, the legislation of West Virginia definitely and separately adopted these standards. Its act in so doing was clearly an exercise of its own police power and is not controlled in any degree by the action of any other state which joined in the compact.

As has been already stated, the compact itself set up the minimum standards for controlling pollution. All that was left to the Commission was the authority to *administer* such standards (Art. VI, pp. 41-42 of Appendix to petitioner's brief). The standards prescribed are more definite and particular than those in other legislation which have been held by this court.

Article VII of the Compact provides:

"Nothing in this compact shall be construed to limit the powers of any signatory State, or to repeal or prevent the enactment of any legislation or the enforcement of any requirement by any signatory State, imposing additional conditions and restrictions to further lessen or prevent the pollution of waters within its jurisdiction."

The police power of West Virginia, therefore, is not limited. Additional and more drastic laws may still be enacted.

Respectfully submitted,

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IN THE

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Petitioner,

vs.

EDGAR B. SIMS, AUDITOR OF THE STATE OF WEST VIRGINIA,

Respondent.

BRIEF OF THE STATES OF OHIO, INDIANA, ILLINOIS, KENTUCKY, PENNSYLVANIA, AND NEW YORK, AS AMICI CURIAE, IN SUPPORT OF PETITIONER.

This brief is filed on behalf of the states of Ohio, Indiana, Illinois, Kentucky, Pennsylvania and New York, as amici curiae, by the chief legal officers of these states under authority of Rule 27, paragraph 9, Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE.

The petition for a writ of certiorari which has been filed in this case contains a full statement of the facts involved and the proceedings in the court below. Inclusion of a similar statement in this brief would be repetitious and would serve no useful purpose. Therefore, petitioner's statement of the case will be adopted for the purposes of this brief, supplemented, however, by emphasizing the fact that each of the states on whose behalf this brief is being filed ratified and enacted into law the Ohio River Valley Water Sanitation Compact in complete reliance upon the ability of each of the other signatories, including the state of West Virginia, to do likewise. Petitioner's statement of the case should be further supplemented by calling the attention of the court to the fact that, since the Ohio River Valley Water Sanitation Compact became effective, each of the states on whose behalf this brief is being filed has undertaken to carry out its respective responsibilities thereunder and has made its proportionate financial contribution to its administration in full expectation that each of the other signatories, including the state of West Virginia, could and would do likewise.

QUESTIONS PRESENTED.

1. Whether the power of a state of the Union to enter into compacts with other states of the Union to which consent and approval of Congress has been given pursuant to Article I, Section 10, Clause 3, of the Constitution of the United States, can be limited or restricted by the provisions of its own constitution.

2. If the power of a state of the Union to enter into compacts with other states of the Union can be restricted by

the provisions of its own constitution, does Article X, Section 4, of the Constitution of the state of West Virginia restrict such power?

3. If Article X, Section 4 of the Constitution of the state of West Virginia can and does restrict the power of that state to enter into compacts with other states of the Union, then, does Article X or any other provision of the Ohio River Valley Water Sanitation Compact subject the state of West Virginia to any obligation in violation of the above mentioned article and section of its constitution?

4. Whether ratification and enactment into law of the Ohio River Valley Water Sanitation Compact by the legislature of the state of West Virginia resulted in an unconstitutional delegation of police power.

ARGUMENT.

1. Whether the power of a state of the Union to enter into compacts with other states of the Union to which consent and approval of Congress has been given pursuant to Article I, Section 10, Clause 3, of the Constitution of the United States, can be limited or restricted by the provisions of its own constitution.

The judgment of the court below, in holding that West Virginia's ratification of the Ohio River Valley Water Sanitation Compact was a violation of a provision of the constitution of that state which prohibited the state from contracting a debt, would, if undisturbed, virtually prohibit that state from entering into any interstate compact whatever since it is only in the rarest of cases that a party to such compact would not be called upon to bear a fair portion of the expense involved therein.

It is not believed possible for a state thus to cast away one of its most important attributes of sovereignty, for the history of interstate compacts clearly shows their essential nature as such. They were utilized during the colonial period with the assent and approval of the Crown. During the period following the Declaration of Independence interstate compacts were utilized by the several states with the consent of the Continental Congress. It seems beyond argument that the inclusion of the compact clause in the Constitution of the United States was not only intended to place a limitation on the powers of the states to exercise this attribute of sovereignty but was also intended to affirm the power, in this respect, which the states had theretofore possessed, subject to the sole and exclusive limitation that the Congress of the United States consent to its exercise, such consent being substituted for that of the King, and, later, that of the Continental Congress.

It is to be remembered that under Article VI, Clause 2, of the Constitution of the United States the Federal Constitution and all laws of the United States made in pursuance thereof shall be the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding. Accordingly, when Public Resolution No. 104, Seventy-Fourth Congress, which gave assent to the compact here under consideration, provided that "no such compact or agreement shall be binding or obligatory upon any state a party thereto unless and until it had been **approved by the legislatures of each of such states** whose assent is contemplated by the terms of the compact or agreement and by the Congress," it necessarily followed that the method thus prescribed for ratification of the compact by the states was the only proper one by which such ratification could be made effective, and that such legislative ratification became the only condition precedent to its becoming effective. It further follows that such congressional act, under Article VI, Clause 2, became the supreme law of the land, anything to the contrary in the Constitution of West Virginia notwithstanding. See **Hawke v. Smith, Secretary of State of Ohio** (1920), 253 U. S., 221, 64 L. Ed., 871.

This conception of the supremacy of federal law in the matter of interstate compacts is supported by the following language of Chief Justice White in **Virginia v. West Virginia** (1918), 246 U. S., 565, 62 L. Ed., 883, at pages 601 and 602 of the U. S. Report, where the scope and effect of Article I, Section 10, Clause 3, was stated in the following language:

> "The vesting in Congress of complete power to control agreements between states, that is, to authorize them when deemed advisable and to refuse to sanction them when disapproved, clearly rested upon the con-

> ception that Congress, as the repository not only of legislative power but of primary authority to maintain armies and declare war, speaking for all the states and for their protection, was concerned with such agreements, and therefore was virtually endowed with the ultimate power of final agreement which was withdrawn from state authority and brought within the federal power. * * *"

Any rule which would permit a state of the Union to place a constitutional restriction upon the power of its legislature to ratify an interstate compact would jeopardize the validity of virtually all such compacts now in existence, and would have the practical effect of virtually nullifying the inherent power to make such compacts which was expressly reserved to the states by Article I, Section 10, Clause 3. So considered, it can only be concluded that such a rule violates the Constitution of the United States and cannot be upheld.

2. If the power of a state of the Union to enter into compacts with other states of the Union can be restricted by the provisions of its own constitution, does Article X, Section 4, of the Constitution of the state of West Virginia restrict such power?

In the event that this court should hold that the provisions of a state constitution can properly limit the power of a state to enter into interstate compacts then it becomes necessary to a determination of this cause to decide whether Article X, Section 4, of the Constitution of West Virginia does in fact limit such power. In this respect this court is not bound by the interpretation of this constitutional provision by the Supreme Court of Appeals of West Virginia under the rules established in **Hinderlider v. LaPlata River & Cherry Creek Ditch Co.** (1938), 304 U. S., 92, 110, Note 12, 82 L. Ed., 1202, 1212, 58 S. Ct., 803, and in **Kentucky v. Indiana** (1930), 281 U. S., 163, 74 L. Ed., 784.

The power of a state to make compacts with other states of the Union is an inherent power which the states possessed prior to admission to the Union under the United States Constitution. Upon the formation of the Federal Union, the Federal Constitution expressly guaranteed the continuation of such power in the several states, subject only to the requirement that it be exercised only with the consent and approval of Congress.

Article X, Section 4, of the West Virginia Constitution does not expressly deny or limit this inherent power. If it contains any such limitation of the power it must be by implication.

Article X, Section 4, purports to be only a limitation on the power of the legislature to regulate the fiscal affairs of the state. The idea that a provision relating to the ordinary fiscal affairs of the state was ever intended by the framers of this constitution or the people who adopted it virtually to deny to the state so important an attribute of sovereignty is one which strains the credulity of informed men, especially in view of the all too well known jealousy of sovereigns in guarding their powers.

Having in mind the importance of the power of the state in this respect as an attribute of sovereignty and considering the obviously narrow intended scope of Article X, Section 4, the conclusion that this constitutional provision, by implication, virtually destroys such attribute of sovereignty is indeed difficult to reach.

3. If Article X, Section 4 of the Constitution of the State of West Virginia can and does restrict the power of that state to enter into compacts with other states of the Union, then, does Article X or any other provision of the Ohio River Valley Water Sanitation Compact subject the state of West Virginia to any obligation in violation of the above mentioned article and section of its constitution?

The prohibition of Article X, Section 4, of the Constitution of West Virginia against the contracting of any debt is subject to certain exceptions enumerated therein. Among these is "to meet casual deficits in the revenue."

The meaning of "casual deficits in the revenue" was considered by the Supreme Court of Appeals of West Virginia in **Dickinson v. Talbott** (1933), 114 West Virginia, 1, 170 S. E., 425. In that case the court had under consideration an attack on a legislative act authorizing a bond issue in the amount of five million dollars on the ground that it violated the provisions of Article X, Section 4, of the state constitution. In holding that act valid despite the constitutional limitation on the incurrence of a debt, the court, speaking of the effect of this constitutional provision as applicable to legislative control of the state's fiscal affairs said, inter alia:

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"The state's constitutional requirements are for the preservation of the state and the maintenance of its integrity and for the protection of the people. Constitutional limitations must not be so construed as to be subversive of their very purpose. * * *"

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"Apropos of both sections 4 and 5, Article X, West Virginia Constitution, it is not to be considered that the framers of our Constitution or the people of the state in ratifying and approving the same, meant to place barriers in the path of the state officials and the legislators, so circumscribing the fiscal affairs of the state as to create impossibility of escape from embarrassing situations."

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"The state of West Virginia is sovereign save only as it has relinquished certain prerogatives to the federal government. In the exercise of the sovereign

attribute of enacting laws the legislative power is inherent; therefore, in construing an act of the state legislature, reference must be had to the state and federal constitutions, not in search of a grant of power, but to ascertain if there is a limitation or restriction of power * * *. In the acts under consideration the legislature, in our judgment, has not violated any constitutional limitation of its authority but has properly acted under its broad and plenary power to provide for the welfare of the state."

It is easy to conclude that if these rules of constitutional interpretation had been applied in the instant case, the court below could not have formed the decision which it did.

The conclusion of the court below that the ratification of the compact here under examination did purport to create a debt in violation of Article X, Section 4, must necessarily have been based on a consideration of the provisions of the compact itself. The only references made in the compact to fiscal affairs appear in Articles V and X, which read in part as follows:

"Article V

"* * * * * * * * * *

"The Commission shall submit to the Governor of each State, at such time as he may request, a budget of its estimated expenditures for such period as may be required by the laws of such State for presentation to the legislature thereof.

"The Commission shall keep accurate books of account, showing in full its receipts and disbursements, and said books of account shall be open at any reasonable time to the inspection of such representatives of the respective signatory States as may be duly constituted for that purpose.

"* * * * * * * * * *

"The Commission shall not incur any obligation of any kind prior to the making of appropriations adequate to meet the same; nor shall the Commission

pledge the credit of any of the signatory States, except by and with the authority of the legislature thereof."

"Article X

"The signatory States agree to appropriate for the salaries, office and other administrative expenses, their proper proportion of the annual budget as determined by the Commission and approved by the governors of the signatory States, one-half of such amount to be prorated among the several states in proportion to their population within the District at the last preceding Federal census, the other half to be prorated in proportion to their land area within the District."

As to Article V, the language clearly evinces a deliberate effort to renounce any notion of contravening the constitutional requirements, in fiscal affairs, of any of the signatory states. Clearly, the court below could not have had anything in this article in mind in reaching the conclusion it did.

There is, however, in Article X, what purports to be an agreement among the signatory states for the sharing of expenses of the project being established; and what purports to be an agreement to appropriate funds therefor.

Since it is virtually a universal rule that a particular legislature cannot be bound in advance to appropriate funds for particular purposes, it would appear that it is this provision in Article X of the compact which led the court below to reach the conclusion it did.

Did this language of Article X actually create a debt within the meaning of Article X, Section 4, of the Constitution of West Virginia? Since a particular legislature cannot be legally bound in advance to make any particular appropriation of funds it is difficult to see how a "debt" could be created by such an "agreement." The practical interpretation to be given to such an "agreement" is that the executive officials of the several signatory states agreed

to use their influence in urging such appropriations by future legislatures to the end that necessary funds would be provided.

The legal position of a signatory state under the language of Article X of the compact is no different than it is when the legislature of such state authorizes the construction of a state institution or the creation of a new department of the government. A moral obligation to provide funds in the future to maintain and support such institution or department certainly would be present even though no obligation might exist. In actual practice every state government in the Union, and the federal government as well, operates continually on this basis, for governments as well as individuals must necessarily depend heavily on moral as well as legal obligations. In this respect it can truly be said that it is the moral quite as often as the legal obligation which gives life to the promises which governments and men live by.

Viewed in this light, the provisions of the compact and the West Virginia statute ratifying it and enacting it into law can and should be construed so as to uphold their constitutionality.

4. Whether ratification and enactment into law of the Ohio River Valley Water Sanitation Compact by the legislature of the state of West Virginia resulted in an unconstitutional delegation of police power or of legislative authority.

The judgment of the court below, in holding that the ratification and enactment into law of the compact was an invalid delegation of the police power of the state was obviously based on what was thought to be an improper attempt to authorize the Ohio River Valley Water Sanitation Commission to:

(a) Require a minimum treatment of sewage and industrial wastes discharged into water of the Ohio drainage basin, and

(b) Issue orders to citizens of the signatory states to compel abatement of any discharge of sewage or industrial waste in violation of the compact. Such authority is given to the commission in Article VI and IX of the compact.

However, it is provided in Article IX of the compact that no such order shall be effective against any corporation, person or entity within a state unless and until it receives the assent of not less than a majority of the commissioners of such state.

Under the provisions of Section 2 of House Bill No. 369, passed March 11, 1939, the legislative act by which West Virginia ratified this compact, two of the commissioners representing that state are to be appointed by the governor with the advice and consent of the Senate; and the third is to be state commissioner of health, by virtue of his office.

Accordingly, control of the power of the Ohio River Valley Water Sanitation Commission to issue orders affecting West Virginia citizens is vested in administrative officials of that state, quite as fully as though that state, acting alone, had created a commission to carry out the purposes for which the compact was made.

Nor is it improper, under West Virginia law, for the legislature to create such an administrative board or commission and to clothe it with rule-making power, provided the legislature prescribes the policy and aims of the project concerned and establishes standards for guidance of the administrative body. This conclusion is clearly supported by the views of the minority of the West Virginia court as expressed in the dissenting opinion filed below in this case. *In* **State v. Bunner** (1943), 126 W. Va., 280, 27 S. E.

(2d), p. 823, the Supreme Court of Appeals of West Virginia said:

> "A statute requiring the public health council to adopt regulations to provide clean and safe milk and fresh milk products, and providing that the violation of regulations of the council which are reasonable and not inconsistent with law shall be a misdemeanor, is not unconstitutional as an improper delegation of legislative authority."

To the same effect is the rule stated in **Riffehart v. Flying Service** (1940), 122 W. Va., 392, 9 S. E. (2d), 521.

While perhaps a good case could be made for the proposition that the exercise by a state of its inherent right of compact with other states of the Union must normally be expected to involve the surrender of some degree of sovereignty for the common good, just as the nation surrenders some degree of sovereignty in concluding a treaty with a foreign state, it is not necessary in the case at bar to pursue this line of reasoning. In this case the language of the compact clearly evinces a deliberate and studied attempt on the part of its framers to avoid the least encroachment on the sovereignty of the signatory states. Indeed, there may be some question whether it has not leaned too far in this direction to permit effective attainment of its objectives. Certainly it should not be struck down by the courts for encroachment on state sovereignty when that sovereignty is so clearly acknowledged and guaranteed by the terms of the compact itself.

CONCLUSION.

For the foregoing reasons the judgment of the court below should be reversed.

Respectfully submitted,

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